
UNITED STATES OF AMERICA,
Appellant

) IN THE COURT OF MILITARY
) COMMISSION REVIEW
)

) APPELLEE'S MOTION TO COMPEL
) PRODUCTION OF DOCUMENTS
)

) CASE No. 07-001
)

v.

) Hearing Held¹ at Guantanamo Bay, Cuba on 4
) June 2007
)

OMAR AHMED KHADR,
Appellee

) Before a Military Commission
) Convened by MCCO # 07-02
) Presiding Military Judge
) Colonel Peter E. Brownback III
)

**TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY
COMMISSION REVIEW**

Relief Sought

COMES NOW Mr. Omar Khadr ("Appellee") and respectfully requests that this Court compel Appellant to produce the tape-recorded interview Special Agent [REDACTED] of Defense Criminal Investigative Service conducted of Captain John W. Rolph on 8 April 2004 referred to in Exhibit 27 to the Inspector General's Report of Investigation, dated 30 April 2004 ("IG Report"), as well as a copy of the email from Captain [REDACTED] U.S Air Force, referred to the Exhibit 27 containing allegations regarding Captain Rolph's involvement with the Office of Military Commissions.

The IG Report describes Captain Rolph's participation in creating the military commission system struck down by the Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Discovery of facts relating to Captain Rolph's participation in the creation of the

¹ Appellee has yet to be arraigned.

military commissions and contacts with attorneys representing the United States may provide a basis for his challenge or recusal. Exhibit 27 is a summary of the tape recorded interview and not a verbatim transcript. It also fails to include the allegations referred to in Captain [REDACTED] email. Production should therefore be ordered.

Facts²

Following the Military Judge's dismissal of charges against Appellee on 4 June 2007, and denial of the Appellant's Motion for Reconsideration, Appellant instituted this appeal pursuant to R.M.C. 908. Captain John W. Rolph, Judge Advocate General's Corps, United States Navy, was named "Deputy Chief Judge" by the Deputy Secretary of Defense on 11 June 2007.³ He designated himself as a member of the panel assigned to hear this case.

Captain Rolph serves as the Chief Judge of the Navy-Marine Corps Court of Criminal Appeals, and so served prior to his ostensible appointment as Deputy Chief Judge of this Court. Before his service as an appellate judge, Captain Rolph served as a Navy trial judge. Captain Rolph, while a trial judge in Norfolk, Virginia, consulted with the Office of the Chief Prosecutor, Office of Military Commissions, beginning in or about January, 2003, regarding the conduct of military commissions under the President's Military Order ("PMO") authorizing trial by military commission for suspected members of Al-Qaeda, *see* 66 Fed. Reg. 57833 (Nov. 16, 2001), and Military Commission Order Number 1 ("MCO No. 1"). His participation included reviewing drafts of the proposed "trial guide" (i.e., script of "how things will unfold during commission sessions") for military commission proceedings at the request of military commission

² The facts relating to the content of the IG Report are based largely on review by Appellee's counsel of the unredacted version of paragraph 28 of the IG Report and Exhibit 27 thereto.

³ The validity of Captain Rolph's appointment is the subject of a separate Motion to Abate Proceedings, filed with the Court on 19 July 2007.

prosecutors. (See Attachment A to Appellee's motion to compel of 6 Aug 2007.) He also prepared "rules of decorum" for military commission proceedings. His activities included communications with attorneys representing the United States (a party to this case) in connection with military commission proceedings. Military commissions convened under the authority of the PMO and MCO No. 1 were ultimately held to be "illegal" by the United States Supreme Court in *Hamdan*, in that they violated the Uniform Code of Military Justice and "Common Article 3" of the 1949 Geneva Conventions. See *Hamdan*, 126 S. Ct. at 2798.

Captain Rolph was interviewed by Department of Defense ("DoD") investigators following allegations of misconduct on the part of military commission prosecutors. The interview was conducted on or about 8 April 2004. It involved, *inter alia*, DoD investigators reading the text of an e-mail from Captain [REDACTED] U.S. Air Force, a prosecutor who was at one point assigned to the Office of the Chief Prosecutor. The e-mail apparently contained allegations of misconduct to which Captain Rolph was asked to respond. The interview with Captain Rolph was tape recorded. Exhibit 27 to the IG Report purports only to be a summary thereof and refers readers to the tape for more details.

Argument

The Court should order production of the 8 April 2007 tape-recorded interview of Captain Rolph and the email containing allegations regarding Captain Rolph's involvement with Military Commissions referenced in summary of the tape-recorded interview in order to provide the parties with information necessary to determine whether a basis exists to challenge Captain Rolph's participation as a judge in this case.

Appellee does not assert that there was anything improper or unlawful about Captain Rolph's communications with military commission prosecutors in 2003, nor does Appellee

dispute the IG Report's finding that nothing in the relationship "crossed the line." Captain Rolph was not then serving as a "presiding officer" in the military commission system, nor was he ever detailed as such. However, now that Captain Rolph has been appointed to serve as a judge on the Court of Military Commission Review, these communications take on added significance. The communications were between a judge of this Court and lawyers representing a party to proceedings therein and they relate to the military commissions process. As a result, disclosure of the tape-recorded interview and Captain [REDACTED] email could provide a basis for challenging his participation as a judge in these proceedings, and/or further discovery relating to the nature and extent of contacts between Captain Rolph and attorneys representing the United States in connection with military commissions. The tape and email are already within the possession and control of the United States; disclosure to the defense is necessary to ensure that the defense is not at an unfair disadvantage in ascertaining whether a basis for challenge or recusal exists. Additionally, failure to produce the tape and email create an appearance problem that, depending on their content, that production of the tape and email might dissipate. In short, the same reasons that led Appellant to provide an unredacted copy of the IG Report materials for review by Appellee's counsel apply with equal force to compel production of the tape and [REDACTED] e-mail.

A motion to compel production of a document is a well-established procedure in military appellate practice. *See, e.g., United States v. Rodriguez-Rivera*, 61 M.J. 148 (C.A.A.F. 2005) (order); *United States v. Kensey*, 36 M.J. 73 (C.M.A. 1992); *United States v. Curtis*, 30 M.J. 22 (C.M.A. 1990); *United States v. Gatlin*, 60 M.J. 804, 806 (N-M. Ct. Crim. App. 2004). Production of the tape and email is essential to resolution of the question of whether Captain Rolph consulted with military commission prosecutors and the content of any such communications, which in turn affects whether a basis for challenge or recusal exists with

respect to him. Absent complete disclosure, it will be impossible for the parties to have “a fair opportunity to explore the impact” of the communications and to develop an appropriate record for review. *See United States v. Martinez*, 40 M.J. 82, 83 (C.M.A. 1994). Accordingly, the Court should compel Appellant to produce unredacted copies of the aforementioned tape and email.

Conclusion

For the foregoing reasons, Appellee respectfully requests the Court to order production of (1) the tape-recorded interview of Captain Rolph conducted by Special Agent [REDACTED] of Defense Criminal Investigative Service on 8 April 2004 in connection with the Inspector General’s Investigation, and (2) Captain [REDACTED] email referenced in Exhibit 27 to the IG Report.

Respectfully submitted,

Dennis Edney
234 Wolf Ridge Close
Edmonton, Alberta, T5T 5M6
Canada
Phone: (780) 489-0835
Email: dedney@shaw.ca
Law Society of Alberta (ID: 7997)
Admitted *pro hac vice*

Nathan Whitling
Parlee McLaws LLP
#1500, 10180 -101 Street
Edmonton, Alberta, T5J 4K1
Canada
Phone: (780) 423-8658
Facsimile: (780) 423-2870
Email: nwhitling@parlee.com
Law Society of Alberta (ID: 11321)
Admitted *pro hac vice*



William C. Kuebler
LCDR, JAGC, USN

Detailed Appellate Defense Counsel

Rebecca S. Snyder

Assistant Appellate Defense Counsel

Office of Military Commissions

1099 14th Street, N.W.

Suite 2000E

Washington, DC 20005

kueblerw@dodgc.osd.mil

snyderr@dodgc.osd.mil

202-761-0133 ext. 116

FAX: 202-761-0510

PANEL No. _____


GRANTED (signature) _____

DENIED (signature) _____

DATE _____

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to this Court; Major Jeffrey D. Groharing, USMC; Captain Keith A. Petty, JA, USA; and Lieutenant Clayton Trivett, Jr., JAGC, USN on 20 August 2007.



William Kuebler
LCDR, JAGC, USN
Detailed Appellate Defense Counsel